Public Bank Bhd v Teck Huat Bricks and Tiles Factory Sdn Bhd

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–430 OF 2002-I
CLEMENT SKINNER J
20 JANUARY 2004

Land Law — Charge — Order for sale — Sale under s 148(2)(c) of the Sarawak Land Code — Court shall order sale 'as in the circumstances seem just' — Whether to be given same narrow and restricted interpretation as expression 'cause to the contrary' under s256(3) of National Land Code

Words and Phrases — 'as in the circumstances seem just' — Sarawak Land Code s148(2)(c)

This was the plaintiff's application, under s 148(2)(c) of the Sarawak Land Code ('the Code') and O 83 of the Rules of the High Court 1980 ('the RHC') for an order to sell five pieces of land owned by the defendant and charged to the plaintiff as security for banking facilities granted to a borrower.

Held, allowing the plaintiff's application:

(1) In an application for sale of land under the Code, the expression 'as in the circumstances seem just' in s 148(2) of the Code, must be given the same narrow and restricted interpretation as the expression 'cause to the contrary' under s 256(3) of the National Land Code, so that in an application for a sale of land under the provisions of the Code, the judge should direct himself in the way indicated by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* (see para 14); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 and *HSBC Bank Malaysian Bhd v Tan Sri Amar Ling Beng* [2003] 4 CLJ 763 followed

(2) Section 148(1) of the Code stipulated that where a notice had been given to the chargor, pursuant to s 148(1), requiring the chargor to remedy any default under the charge and the chargor failed to do so, then the chargee may apply for a sale of the chargor's land and the court hearing such an application may make such order as in 'the circumstances seem just'. In the instant case, the statutory notice referred to in s 148 of the Code had been given by the plaintiff to the defendant by registered post (see para 10).

(3) Insofar as compliance with the procedural requirements prescribed by O 83 of the RHC was concerned, all that the plaintiff was required to state was: (a) the amount of the advance; (b) the amount of the repayments; and (c) the amount of any interest or instalment in arrears at the date of issue of the originating summons and as at the date of the affidavit; and (d) the amount remaining due under the charge. Here, the plaintiff had given the particulars required by O 83 r 3 of the RHC (see paras 17–18).

(4) In respect of the defendant contention that the plaintiff was in breach of contract in that it had not complied with its own letter of offer, the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* had held that an allegation of breach of contract could not be relied on to oppose an order for sale as it was 'insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale'. In any case, there was no merit in the point taken by the defendant regarding the plaintiff's alleged breach of the letter of offer (see paras 22–24); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 followed.

(5) Accordingly, the defendant had not shown any grounds upon which it can be said that it would not be 'just in the circumstances' to order a sale of its land (see para 26).

[**Bahasa Malaysia summary**

Ini adalah permohonan plaintif, di bawah s 148(2)(c) Kanun Tanah Sarawak ('Kanun tersebut') dan A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu perintah menjual lima keping tanah yang dimiliki oleh defendan dan dicagarkan kepada plaintif sebagai jaminan untuk kemudahan perbankan yang diberikan kepada peminjam.

Diputuskan, membenarkan permohonan plaintif:

(1) Dalam satu permohonan untuk jualan tanah di bawah Kanun tersebut, ungkapan 'as in the circumstances seem just' dalam s 148(2) Kanun tersebut, hendaklah diberikan tafsiran yang sempit dan terhad seperti ungkapan 'cause to the contrary' di bawah s 256(3) Kanun Tanah Negara, supaya dalam satu permohonan untuk jualan tanah di bawah peruntukan Kanun tersebut, hakim hendaklah mengarahkan dirinya sebagaimana yang diputuskan oleh Mahkamah Persekutuan dalam kes *Low Lee Lian v Ban Hin Lee Bank Bhd* (lihat perenggan 14); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 dan *HSBC Bank Malaysian Bhd v Tan Sri Amar Ling Beng* [2003] 4 CLJ 763 diikut

(2) Seksyen 148(1) Kanun tersebut menetapkan bahawa di mana satu notis telah diberikan kepada penggadai, menurut s 148(1), yang menghendaki penggadai meremedikan apa-apa kegagalan di bawah gadaian tersebut dan penggadai yang gagal berbuat demikian, maka pemegang gadai tersebut boleh memohon untuk jualan tanah penggadai tersebut dan mahkamah yang mendengar permohonan sedemikian boleh membuat perintah yang mana 'the circumstances seem just'. Dalam kes semasa, notis statutory yang dirujuk kepada dalam s 148 Kanun tersebut telah diberikan oleh plaintif kepada defendan melalui pos berdaftar (lihat perenggan 10).

(3) Setakat pematuhan keperluan-keperluan prosedural yang ditetapkan oleh A 83 KMT adalah berkaitan, apa yang plaintif dikehendaki nyatakan adalah: (a) jumlah pendahuluan; (b) jumlah bayaran balik; dan (c) jumlah apa-apa faedah atau bayaran ansuran yang tertunggak pada tarikh keluaran saman pemula dan pada tarikh affidavit dikeluarkan; dan (d) baki jumlah yang perlu dibayar di bawah gadaian tersebut.

Disini, plaintif telah diberikan butir-butir yang dikehendaki oleh A 83 k3 KMT (lihat perenggan-perenggan 17–18).

(4) Berhubung hujah defendan bahawa plaintif telah melanggar kontrak kerana ia tidak mematuhi surat tawarannya sendiri, Mahkamah Persekutuan dalam *Low Lee Lian v Ban Hin Lee Bank Bhd* telah memutuskan bahawa satu pengataan perlanggaran kontrak tidak boleh digunakan untuk membangkang satu perintah jualan kerana ia adalah 'insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale'. Dalam apa kespun, tidak terdapat apa-apa merit yang diutarakan oleh defendan berkaitan perlanggaran surat tawaran plaintif yang dikatakan tersebut (lihat perenggan-perenggan 22–24); *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 diikut.

(5) Sewajarnya, defendan tidak menunjukkan apa-apa alasan yang boleh dikatakan bahawa ia tidak 'just in the circumstances' untuk memerintahkan satu jualan tanah tersebut (lihat perenggan 26).]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2052–2157.

Cases referred to

HSBC Bank Malaysian Bhd v Tan Sri Amar Ling Beng [2003] 4 CLJ 763 (folld)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (folld)

Legislation referred to

Evidence Act 1950 s 90
National Land Code s 256(3), 340
Rules of the High Court 1980 O 2 r 1(2), O 83 r 3(3)
Sarawak Land Code s 148(1), (2)(c)

Tan Cho Huat (Teo Sebom, Tan & Madhi) for the plaintiff.
Foraiza bin Mohd Nazri (Wan Junaidi & Co) for the defendant.

Clement Skinner J:

[1] This is the hearing of an application made by Public Bank Berhad ('the plaintiff') under to s 148(2)(c) of the Sarawak Land Code ('the Code') and O 83 Rules of the High Court 1980 ('the RHC'), for an order to sell 5 pieces of land owned by Teck Huat Bricks and Tiles 25 Factory Sdn Bhd ('the defendant') and described as:

(i) Lot 103 Lambir Land District,

(ii) Lot 332 Lambir Land District,

(iii) Lot 334 Lambir Land District,

(iv) Lot 391 Lampir Land District, and

(v) Lot 404 Lambir Land District ('the said lands').

[2] The facts leading up to this application are these. On 16 October 1996, the defendant charged the said lands to the plaintiff as security for credit facilities up to an aggregate sum of RM250,000 with interest thereon at the specified rates ('the first loan'), granted to a company called Pleasant Avenue Sdn Bhd ('Pleasant Avenue'). The memorandum of charge in respect of the first loan was registered at the Miri Land Registry Office as instrument NoL10520/1996 ('the first charge').

[3] It was a term of the first charge that:

(a) the defendant shall on demand repay to the plaintiff all such sums of money which shall at any time be due and owing by Pleasant Avenue;

(b) if the defendant shall default in payment of any moneys whether principal or interest payable under the first charge for a period of seven days, then the whole of the first loan and any interest and all other sums of money for the time being owing under the first charge shall immediately become due and payable and the plaintiff shall forthwith become entitled to all remedies conferred on it by law.

[4] On 9 October 1997, the defendant executed a second charge over the said lands in favour of the plaintiff as security for a fixed loan of RM200,000 ('the second loan'), granted to Pleasant Avenue. The 20 memorandum of charge in respect of the second loan was registered at the Miri Land Registry Office as Instrument No L9955/1997 ('the second charge').

[5] It was a term of the second charge that:

(a) the second loan was repayable on demand but until such demand was made, by 60 equal monthly instalments of RM4,541 each together with interest thereon at 12.90%, commencing from the first day of the month following next after the date of full release of the second loan;

(b) if Pleasant Avenue or the defendant shall make default for a period of seven days in payment of any one or more of the monthly instalments or interest thereon, then the second loan and any interest and all other moneys for the time being owing under the second charge shall immediately become due and payable and the plaintiff shall forthwith become entitled to all remedies conferred on it by law.

[6] Subsequently, the plaintiff increased the amount of the second loan to RM223,400 and also extended the period of repayment to 85 months by equal monthly instalments of RM3,500 each. On 22 May 2000, a memorandum of variation of charge instrument reflecting the above variation was registered at the Miri Land Registry Office as Instrument No L4988/2000.

[7] Pleasant Avenue defaulted in its obligations to the plaintiff in respect of the first and second loan, as a result of which the plaintiff caused its 20 lawyers to issue a statutory notice addressed to the defendant pursuant to s 148 of the Code, informing the defendant of Pleasant Avenue's default under the first and second loan and demanding that the defendant make payment of (a) a sum of RM225,741.64 together with interest thereon at 8.90%pa on monthly rests and additional interest at 1%pa being the

outstanding sum due as at 31 October 2002 in respect of the first loan; and (b) a sum of RM178,743.49 together with interest thereon at 8.90%pa on monthly rests and additional interest at 1%pa being the outstanding sum due as at 31 October 2002 in respect of the second loan. The defendant was given seven days to remedy the default abovementioned failing which the plaintiff would resort to its remedy under s 148 (2) of the Code. The statutory notice which is dated 4 November 2000, was sent to the defendant by registered post on 6 November 2000 but the defendant did not pay the amounts demanded of it within the time specified or at all. Hence the plaintiff's application for sale.

[8] The defendant opposes the plaintiff's application on two grounds, namely:

(a) the plaintiff had by a letter of offer dated 5 August 2002, offered Pleasant Avenue a fixed loan of RM248,000, the purpose of which was to convert the first loan from a 'flexi-loan' to a fixed loan and to discharge the first charge registered as Instrument No LI0520/1996. According to the defendant Pleasant Avenue had accepted the aforementioned offer but the plaintiff has been in breach of its obligations under the letter of offer by not complying with it. By this, I take it to mean that the defendant is alleging that the plaintiff never converted the first loan into a fixed loan. It is the defendant's case that once Pleasant Avenue had accepted the plaintiff's letter of offer dated 5 August 2002, a binding contract came into existence, the result of which, according to the defendant, was that the plaintiff had 'no cause of action under the memorandum of charge Instrument No LI0520/1996 (ie the first charge), memorandum of charge Instrument No L9955/1997 (ie the second charge) and memorandum of variation of charge Instrument No L4988/2000 as the amount due thereunder have been fully settled by virtue of the plaintiff's letter of offer dated 5 August 2002', (see para 4 of Sim Then Koh's affidavit affirmed on 7 November 2003 on behalf of the defendant);

(b) the plaintiff failed to comply with Order 83 RHC, in that, (i) the plaintiff had failed to correctly state the amount of advance and the amount of interest since the amounts stated by the plaintiff do not tally with the statement of accounts exhibited by the plaintiff as exh 'E', in that, while para 11 (iv) of the affidavit of Lim Hun Kwang affirmed on behalf of the plaintiff on 31 December 2002 states that the amount outstanding and due (including accrued interest) as at 30 November 2002 was RM258.021.39, exh 'E' of Lim Hun Kwang's affidavit of 14 November 2003, ie the statement of account of Pleasant Avenue, shows the outstanding amount is RM259,970.37; and (ii) there was no documentary evidence to show the amount due and outstanding to the plaintiff.

[9] Before dealing with each of the defendant's grounds I will address the law relating to the plaintiff's application.

[10] Section 148(2) of the Code states that where a notice has been given to the chargor (pursuant to s 148(1)) requiring the chargor to remedy any default under the charge and the chargor fails to do so, then the chargee may

apply for a sale of the charger's land and the court hearing such an application may make such order as in 'the circumstances seem just'.

[11] In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, the Supreme Court held that a chargee who makes an application for sale under the National Land Code does not commence an action — he merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee therefore does not sue for a debt — his claim for an order for sale is not based on covenant but under the registered charge. Inmy judgment, the position of a chargee applying for a sale of charged land under the provisions of s 148 of the Code can be no different in law from that of a chargee under the National Land Code — he too is exercising his statutory remedy against the chargor in default.

[12] In the case of an application for sale of charged land pursuant to s 256(3) of the National Land Code, the court shall make an order for sale unless it is satisfied of the existence of 'cause to the contrary'. In *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 the Federal Court held that for reasons of policy, the expression 'cause to the contrary' should be given a narrow and restrictive interpretation so that 'cause to the contrary' may be established only in three categories of cases, namely:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

[13] The Federal Court also said that an application for sale of charged land is a speedy and summary procedure where the judge is concerned with three things, namely:

(i) with whether the chargee has given the appropriate statutory notice as stipulated in the National Land Code;

(ii) that the procedural requirements prescribed by O 83 of the RHC have been complied with; and

(iii) with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

[14] In *HSBC Bank Malaysia Bhd v Tan Sri Datuk Amar Ling Beng Siew* [2003] 4 CLJ 763, I expressed my view that while in the case of an application for sale of charged land under the Code, the court will make such order 'as in the circumstances seem just' and that on first reading the expression 'as in the circumstances seem just' appears to confer on the court a very wide discretion of whether to order a sale or not, I gave my reasons for saying why, for the very same reasons of policy as stated in *Low Lee Lian*'s case, the expression 'as in the circumstances seem just' must be given the same narrow and restricted interpretation as the expression 'cause to the contrary' which

is found in the National Land Code, so that on an application for a sale of charged land under the provisions of the Code, a judge will direct himself in the way indicated by the Federal Court in *Low Lee Lian*'s case.

[15] Adopting the approach recommended in *Low Lee Lian*'s case, I now revert to consider the application at hand.

[16] In so far as I am required to consider whether the plaintiff has given the appropriate statutory notice referred to in s 148 of the Code, I have already stated earlier that the plaintiff sent a notice to the defendant dated 4 November 2002 by registered post, informing it that Pleasant Avenue had defaulted in payment of the first and second loan and that the defendant was required to make payment of the sums then outstanding in respect of each loan within seven days failing which an application for sale under s 148(2) would be made. There has been absolutely no complaint in this regard raised by the defendant. So there is no reason to refuse the application on this ground.

[17] With regard to the question whether the plaintiff has complied with the procedural requirements prescribed by O 83 of the RHC, this is where the defendant's second ground of objection calls for consideration. I regret I find the complaints of the defendant on this ground quite unfounded. ByO 83 r 3, all that the plaintiff is required to state in its application is particulars of:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalment in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge.

[18] A perusal of the plaintiff's application shows that in respect of both loans, the plaintiff has given the particulars required by O 83 r 3. Although the defendant has not taken this point, I should point out that the only criticism that may be made of the particulars given is in respect of item (c) above as the plaintiff's application stated the amount of interest in arrears as at 30 November 2002, whereas the rule requires the amount to be stated at the date of the originating summons and affidavit, which is 31December 2002. However, I did not regard this omission as being of any significance or seriousness so as to lead me to conclude that the plaintiff had not complied with the provisions of O 83 r 3(3) because the omission was one that went to calculation of the figures at specified dates only. I should point out that this omission has been made good in the supplementary affidavit of Lim Hun Kwang filed on behalf of the plaintiff on 5 January 2004, to which no objection has been taken.

[19] With regard to the defendant's complaint that the figures shown in the plaintiff's affidavit of 31 December 2002 in respect of the first loan do not tally with the plaintiff's statement of account exhibited as 'E' to the affidavit of Lim Hun Kwang affirmed on 14 November 2003, I see absolutely

nothing in the point taken by the defendant because there is a good explanation why the amounts do not tally — in para 11(iv) of Lim Hun Kwang's affidavit of 31 December 2002, the amount outstanding is stated as at 30November 2002 whereas in exh 'E' the statement of account shows the amount outstanding as at 31 December 2002. The difference in figures has been corrected by Lim Hun Kwang's affidavit of 5 January 2004. Even if it had not been so corrected, I would have treated the difference in the figures given as a very minor irregularity which could be cured under O 2 r 1(2) because the defendant has not been able to demonstrate what prejudice, if any, it has suffered by the plaintiff's omission.

[20] With regard to the defendant's complaint that there was no documentary evidence to show the amount due and outstanding, the defendant has not pointed out to me any provision in O 83 r 3 which requires the plaintiff to produce such a document. I regard the averments made in the affidavits filed on behalf of the plaintiff regarding the granting of the first and second loan, the execution of the first and second charge over the said lands as security for the said loans, and the fact that there has been default and non-payment by the defendant of its obligations under the first and second charge together with the particulars regarding the amount outstanding in respect of each loan in accordance with O 83 r 3(3), as evidence of default by the defendant and of the amounts due and payable. The defendant has never denied the above facts i.e. the granting of the loans to Pleasant Avenue or that Pleasant Avenue has defaulted under the two loans. The defendant also does not deny receiving the statutory notice sent to it. The defendant does not even dispute the particulars about the amount claimed as stated in the affidavit of Lim Hun Kwang affirmed on 31 December 2002, apart from saying it does not tally with exh 'E'. So its complaint that the plaintiff cannot rely on exh 'E', because s 90 of the Evidence Act 1950 had not been complied with, is to no avail as the plaintiff does not need to rely on exh 'E' to succeed in its application.

[21] On this ground too I find no reason to refuse the sale.

[22] Lastly, I will consider whether the defendant has shown that it would not be 'just in the circumstances' to order a sale of its lands. It is in this context that I will consider the defendant's first ground of objection, ie the plaintiff had not complied with its own letter of offer of 5 August 2002, which Pleasant Avenue had accepted.

[23] In essence, what the defendant complains about here is that the plaintiff is in breach of contract. However, in *Low Lee Lian v Ban Hin Lee Bank Bhd*, the Federal Court has held that an allegation of breach of contract cannot be relied on to oppose an order for sale because:

> an allegation that the chargee acted in breach of contract, while it may give rise to an independent action in personam, is insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale.

[24] I should also point out that the defendant's allegation regarding the letter of offer, even if true, would be of no assistance to the defendant here because the offer was only to convert the first loan into a fixed loan — it had

nothing to do with the status of the second loan which, as the affidavit evidence shows, was in default. It is factually incorrect, therefore, for the defendant to say that because Pleasant Avenue had accepted the letter of offer, nothing more was owed by it to the plaintiff. The defendant has conveniently overlooked the fact that it is in default under the second loan.

[25] Quite apart from the above, I find nothing in the point taken by the defendant about the plaintiff being in breach of its letter of offer because the defendant seems to be labouring under the impression that upon Pleasant Avenue's acceptance of the letter of offer of 5 August 2002, the first loan became repaid. This cannot be so for the simple reason that the plaintiffs letter of offer contained pre-conditions which needed to be fulfilled by Pleasant Avenue before the first loan could be converted to a fixed loan. According to the plaintiff, one pre-condition was that Pleasant Avenue would settle all outstanding arrears under account No 2-0423314-11, ie the second loan and another loan account No 2-0423313- 14 secured by a charge over another piece of land (registered as Instrument No L10519/1996. In addition to that, the plaintiff says that another condition was that Pleasant Avenue would execute a standing instruction for the payment of monthly instalments of all its loan accounts with the plaintiff. In the plaintiff's affidavit of 14November 2003, affirmed on its behalf by its Branch Manager Mr Lim Hun Kwang, the plaintiff by paras 4, 5 and 6 of that affidavit asserted that Pleasant Avenue never complied with the above two conditions and was itself in breach of the letter of offer as a result of which the plaintiff was unable to proceed with or complete the conversion of the first loan and consequently cancelled the letter of offer. The defendant has not replied to or answered these assertions of the plaintiff. So its contention that once Pleasant Avenue had accepted the letter of offer nothing more was owed to the plaintiff, has no substance in it.

[26] It follows from what I have just said that the defendant has not shown any grounds upon which it can be said that it would not be 'just in the circumstances' to order a sale of its lands. On this ground too there is no reason to refuse the plaintiff's application for sale.

[27] For completeness I should mention that in its affidavit to oppose the plaintiff's application, the defendant had taken the point that the plaintiff should only be allowed costs on a party and party basis and not on a solicitor and client basis but this point was not pursued at the hearing and so I will treat it as abandoned.

[28] In the result, for the reasons I have given I find that on the materials placed before me the defendant has not shown that it would not be just in the circumstances to order a sale of its lands. I accordingly grant the plaintiff's application for sale in terms.

Plaintiff's application allowed.

Reported by Lim Lee Na